Filed 7/10/20 Le v. Pham CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KEVIN LE et al., Plaintiffs and Respondents, v. HIEP X. PHAM, Defendant and Appellant.	H044978 (Santa Clara County Super. Ct. No. 1-15-CV2287708)

On or about January 2, 2013, respondent Kristopher Le entered into a contract to purchase a residence on Lombard Avenue in San Jose (the property) from appellant Hiep X. Pham. The closing date of the sale was not specified, but the second installment payment was due from Kristopher on or before December 31, 2013.[1] After Pham refused to convey the property, Kristopher and his father, Kevin Le, filed a lawsuit seeking, inter alia, damages for breach of contract and specific performance. (Hereafter, Kristopher and Kevin are collectively referred to as respondents.)[2] The lawsuit (Superior Court of California, County of Santa Clara, No. 1-14-CV-263286; hereafter, the first action) proceeded to court trial, and

[1] Since respondents have the same surname, we will refer to them separately by their first names for purposes of clarity and not out of disrespect. (See *Rubinstein v. Rubenstein* (2002) 81 Cal.App.4th 1131, 1136, fn. 1.)

[2] Although the January 2, 2013 contract names Kristopher as the buyer, for reasons unclear from the record, Kevin was a named plaintiff in both lawsuits at issue in this appeal, and he is generally treated as having been a contracting party in the prospective purchase of the property.

on August 21, 2015, judgment was entered denying respondents' claims against Pham for breach of written contract, declaratory relief and specific performance, and fraud, the court concluding that respondents had failed to meet all obligations under the contract. The judgment contained no indication that the contract for sale of the property was terminated. The court found in respondents' favor in the first action, awarding them damages of $3,928.71 on a breach of oral contract claim.

After trial and before entry of judgment in the first action, respondents took measures to pay off a deed of trust encumbering the property. Based on this action, respondents moved for a new trial or, in the alternative, for a judgment notwithstanding the verdict (JNOV). The motions were denied by the trial court.

Shortly thereafter, respondents filed a new complaint for declaratory relief against Pham (the second action), which is the subject of the present appeal. Respondents alleged that, because they had made all payments under the contract and had paid off the deed of trust against the property, they were entitled to a judicial declaration that they were the sole owners of the property and that Pham had no right, title or interest therein. After a court trial, judgment was entered in favor of respondents. Pham's postjudgment motion for JNOV or, in the alternative, motion to set aside and vacate judgment, was denied.

On appeal, Pham argues that respondents' second action was barred by res judicata (claim preclusion) because there had been a final judgment on the merits in favor of Pham on the breach of written contract and specific performance claims in the first action. Pham also argues that he rescinded the contract due to respondents' nonperformance, and the contract was therefore extinguished. Lastly, Pham contends—having failed to assert the argument below—that respondents materially breached the contract, and that Pham was therefore justified in terminating, and in fact terminated, the contract.

We conclude that the court did not err. We conclude, inter alia, that (1) the entry of final judgment in the first action did not result in the second action filed by respondents being barred under the doctrine of claim preclusion; (2) Pham has failed to establish that the

trial court erred in rejecting his claim that he rescinded the contract; and (3) there is no merit to his claim, which he failed to preserve in the trial court, that he terminated the contract. We will therefore affirm the judgment and the postjudgment order denying the motion for JNOV and alternative motion to set aside and vacate the judgment.

I. PROCEDURAL BACKGROUND

A. The First Action

1. Complaint

On April 4, 2014, respondents filed a verified complaint in the first action against Pham. They alleged the following causes of action: (1) breach of written contract; (2) breach of oral contract; (3) declaration of rights and specific performance; and (4) fraud and conversion.[3]

Respondents alleged[4] in the complaint that on January 2, 2013, they entered into a contract with Pham for the purchase and sale of the property. The "quite simple" terms of the contract were that (1) the property would be conveyed by Pham by grant deed with title being taken in Kristopher's name; (2) respondents "would assume responsibility for the existing first mortgage"; (3) respondents would "pay to Pham the total sum of $120,000, of which $60,000 was to be paid by January 11, 2013 and the remaining $60,000 was to be paid no later than December 31, 2013"; (4) "[u]ntil Pham was paid in full, [respondents were to be] responsible to either reimburse Pham monthly for the mortgage payments and any property taxes that came due, or pay those expenses directly."

---

[3] On our own motion, we take judicial notice of the complaint and the answer to complaint filed in the first action; neither pleading was part of the record on appeal. (Evid. Code, § 459, subd. (a).)

[4] For convenience and to avoid repetition, in this paragraph and the succeeding seven paragraphs, we describe the specific allegations of the complaint in the first action without repeating in each sentence the words "respondents alleged."

Pham executed a grant deed "on February 11, 2013, by which Pham only purported to transfer an undivided half interest to Kristopher T. Le, rather than the full title as required under the parties[']agreement."[5] This grant deed was recorded on February 14, 2013.

"[Respondents] made all payments to defendant Pham that were required under the agreement for sale and purchase" of the property. Specifically, respondents made payments between January 2, and March 15, 2013, totaling $145,000. Although the contract called for payments totaling $120,000, "Pham extorted an extra $25,000 from [respondents] on or around January 11, 2013, when he refused to perform the agreement unless [respondents] increased the total of [the] payments to $145,000."

Respondents also performed under the contract by making all monthly mortgage payments, either by delivering the funds to Pham or by paying the bank directly. Respondents discovered in December 2013 that Pham had fallen behind in payments on the mortgage and that Wells Fargo Bank (Wells Fargo) was threatening foreclosure, notwithstanding respondents' prior delivery of funds to Pham for the mortgage payments. As a result, respondents made a lump sum payment of $7,886.71 to Wells Fargo. Respondents also paid sums to Pham unrelated to the property; the total amount owed by Pham to respondents (including the additional $25,000 demanded by Pham for the property and the $7,886.71 paid to Wells Fargo to prevent foreclosure) was $43,928.71. Pham refused, despite respondents' performance under the contract, to execute and deliver a grant deed conveying to Kristopher "all of Pham's right, title and interest in the subject property."

In the first cause of action for breach of written contract, respondents alleged that they had performed all obligations required of them. Pham breached the contract "by coercing [respondents] into paying him $25,000 more that the contract required," and by

[5] Respondents alleged that initially, on January 3, 2013, Pham executed and delivered a grant deed conveying the property in its entirety to Kristopher. The county recorder rejected the deed's recordation because of noncompliance with a formality, and respondents requested that Pham sign a new deed.

failing to make all payments to Wells Fargo. Respondents "suffered actual injury" as a proximate result of Pham's breach of contract, "when Pham failed and refused to transfer title and extorted and converted the funds."

The second cause of action was for breach of oral contract.[6] Kevin and Pham "entered into a series of oral loan agreements" in which Kevin loaned Pham funds for personal reasons and Pham agreed to repay the loans. Pham breached the oral agreements by failing to repay the loans, and Kevin was damaged in the sum of $11,042, plus interest.

Respondents alleged in the third cause of action for declaratory relief and specific performance that, since Pham had received all payments required under the contract, he was obligated to convey any interest in the property to Kristopher. Respondents thus requested a judgment ordering specific performance of the contract.

In the fourth cause of action of the complaint for fraud and conversion, respondents alleged that Pham had induced them to enter into the contract, but he did not intend to perform it by delivering an executed grant deed in favor of Kristopher. Pham intentionally deceived respondents to obtain substantial funds from them without intending to transfer title to the property. As a result of Pham's fraud and conversion, respondents "suffered actual injury including the payments to Pham totaling $188,928.71 . . . and the loss of title to the real property and all funds that [respondents] have paid towards the mortgage and upkeep of the real property, in an amount to be proved at trial."

Pham filed an answer to the complaint on August 5, 2014. In the answer, Pham denied the material allegations of the complaint.

---

[6] The heading in the complaint read "(Breach of Written Contract)." It is clear from the allegations of the complaint that respondents alleged a breach of oral contract in the second cause of action.

2. Trial and Judgment

The first action proceeded to court trial on August 12, 2015. The court announced its decision from the bench. On August 21, 2015, the court entered judgment consistent with its previously announced decision.

In the judgment, the court denied respondents' first cause of action for breach of written contract, concluding that they had "failed to prove each element." The court recited its findings "that the agreed price for the house at issue was $385,000. [Respondents] were required to pay the balance of the mortgage on the home plus $160,000. [Respondents] failed to establish that they completed all of the terms of the contract required of them in that they have not completed paying the mortgage, or did not successfully refinance the mortgage, and $15,000 of the $160,000 is outstanding."

The trial court further denied relief on respondents' third cause of action for declaratory relief and specific performance. The court found that, based on its "ruling on [respondents'] first claim for Breach of Contract of the sale of the house," they had failed to prove the declaratory relief/specific performance claim. The court did not indicate in the judgment that the contract for the sale of the property was terminated.

The trial court also denied relief on respondents' fourth cause of action for fraud and conversion. It reasoned: "The Court found that [Pham] entered into the contract for sale of the house with good intentions of selling the house to [respondents]. Furthermore, [Pham] attempted to help Kristopher refinance the house by adding his name to the deed as a 50% owner. Moreover, [respondents] have not completed their obligations under the contract[;] therefore, [Pham] has not been obligated to deed the property to [respondents]."

As to the second cause of action for breach of oral contract, the trial court recited in the judgment that it had permitted respondents to amend the claim according to proof "to include $7,886.71 for the extra payments on the mortgage that [respondents] were forced to pay to preclude foreclosure on the house." The court found, based upon admissions in Pham's answer and his testimony, that he owed respondents $18,928.71 under the oral

contract. The court credited Pham the sum of "$15,000 of the outstanding balance owed to him by [respondents] for the sale of the house," resulting in a net sum of $3,928.71 owed by Pham under the second cause of action. Judgment was entered in favor of respondents in that amount.[7]

Respondents thereafter filed alternative motions for JNOV or for new trial. The court heard argument and denied the motions in an order filed October 19, 2015 (discussed in greater detail, *post*).

Respondents filed a notice of appeal from the judgment. Respondents filed a notice of abandonment of that appeal on or about January 18, 2017.

B. The Second Action

1. Complaint

On November 4, 2015, respondents filed a complaint in the second action. They filed a first amended complaint (hereafter the complaint) on November 6, 2015, alleging a single cause of action for declaratory relief.

Respondents alleged in the complaint that they entered into a written contract with Pham on January 2, 2013 (hereafter, the contract) to purchase the property.[8] Pham refused to execute and deliver a quitclaim deed to the property, notwithstanding respondents' performance of all obligations under the contract. After a two-day trial in the first action, the trial court announced its tentative decision on August 13, 2015. The court interpreted the contract as providing for a total purchase price of $385,000 (rather than $340,000 recited

---

[7] The language in the judgment reads: "Judgment shall enter in favor of Plaintiff Kevin Le against Hiep Pham in the amount of $3,928.71." The parties do not explain this discrepancy in the judgment, namely, the recital that the oral contract claim was asserted by both respondents and the language entering judgment in favor of Kevin, only.

[8] As noted (see fn. 2, *ante*), the contract identifies Kristopher only as the buyer of the property.

We avoid using the repetitious "respondents allege" in this paragraph and the succeeding two paragraphs to describe the material allegations of respondents' complaint.

in the contract). It found that respondents had paid $145,000 toward the purchase price, and it concluded that under the contract, respondents were required to pay an additional amount of $15,000 and were required to pay off the existing mortgage. Respondents alleged that the court deferred entering judgment until August 21, 2015, to afford "the parties an opportunity to resolve the issues that would be left unresolved by the tentative ruling, such as title to the real property and the status of the mortgage." At the hearing on August 21, respondents' counsel advised that his clients had paid off the mortgage, a fact Pham acknowledged. "Notwithstanding that [respondents] had come to court with a notary to witness [Pham's] signature on a quitclaim deed, [Pham] refused to sign a quitclaim deed." Due to Pham's refusal to sign a quitclaim deed, the court entered the judgment in the first action on August 21, 2015

Respondents alleged that, as of August 21, 2015, they had fulfilled all obligations required of them under the contract as interpreted by the court in the judgment in the first action by having paid $385,000 for the property, including the mortgage payoff.[9] Pham breached the contract by failing and refusing to deliver to Kristopher an executed quitclaim deed conveying all of Pham's interest in the property. As of the filing of the complaint, Pham had "received the benefit of $160,000 in cash that [respondents] paid to him, plus [the] pay[-]off of a home mortgage of approximately $225,000 (plus all interest since January 2013), while retaining record title to the subject property."

Based upon the circumstances alleged in the complaint, respondents asserted there was an actual controversy concerning the parties' rights and duties under the contract, as interpreted by the court in the judgment in the first action. Respondents sought a judicial

[9] Respondents alleged that on the afternoon of August 21, 2015, Pham met with respondents' counsel, at which time Pham delivered $3,928.71, and respondents' counsel delivered to Pham an acknowledgment of satisfaction of the judgment in the first action. Through Pham's payment consistent with the judgment, respondents effectively "paid" the remaining $15,000 found by the trial court in the action to be owing under the contract for the purchase of the property.

declaration that Kristopher was the sole legal owner of the property and that "Pham has no right, title or interest in that real property."

2. Cross-Complaint

Pham, as a self-represented litigant, cross-complained against respondents on January 11, 2016. In the cross-complaint[10] asserting three causes of action, Pham alleged that "[respondents] purposely delayed satisfying their obligations under the [c]ontract so they could test the market to see if the [p]roperty would appreciate in value. Now that the [p]roperty is worth over $700,000 . . . [respondents] want to remedy their failure to perform under the [c]ontract so they can benefit from the increase in the value of the [p]roperty."

In the first cause of action of the cross-complaint for declaratory relief (captioned as a claim for rescission), Pham alleged that the consideration under the contract had failed in a material respect due to respondents' "fail[ure] to pay the balance of the mortgage on the home plus $160,000." Pham asserted that his allegation was supported by the court's judgment in the first action. Pham sought a judicial declaration that the consideration under the contract failed in a material respect and that the contract was thereby rescinded. In the second cause of action for breach of contract, Pham alleged that respondents breached the contract by failing to pay off or refinance the mortgage and by failing to pay $15,000 of the $160,000 cash required under the contract. Pham alleged in the third cause of action a claim for fraud (false promise), averring that when respondents' made the promises to pay off the mortgage and pay $160,000 to Pham, they "did not inten[d] to perform them within a reasonable time so they could wait and test the market."

---

[10] The record before us contains a pleading with the typed caption "**CROSS COMPLAINT OF DEFENDANT HIEP X. PHAM**" with "Amended" handwritten above it. From the register of actions that is part of the record, it appears that Pham filed both a cross-complaint and an amended cross-complaint on January 11, 2016. Our references herein to the cross-complaint are to the pleading in the record designated as the amended cross-complaint.

3. Trial and Judgment

After a two-day court trial in the second action and submission of the matter, the court filed its judgment on June 7. 2017, finding in favor of respondents. The court held under the complaint that "Kristopher . . . is the sole legal owner of the . . . property . . . and . . . Pham has no right, title or interest in that real property." The court denied recovery on Pham's cross-complaint. The court held further that if Pham refused to sign a quitclaim deed within 30 days of the judgment, respondents could move the court for an order appointing the clerk of the court as an elisor to execute a quitclaim deed on Pham's behalf.

Pham, through counsel, thereafter filed a motion to set aside and vacate the judgment or, in the alternative, a motion for JNOV. He argued that, based upon principles of res judicata, the final judgment in the first action in which the court concluded that respondents had failed to perform under the contract had preclusive effect with respect to second action seeking a declaration of rights that Kristopher was the sole owner of the property. The court denied Pham's alternative motions on July 14, 2017.

Pham filed a timely notice of appeal from the judgment and from the postjudgment order denying the motions for JNOV and to vacate the judgment.

II. DISCUSSION

A. Standard of Review

" 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.) "All issues of credibility are for the trier of fact, and all conflicts in the evidence must be resolved in support of the judgment. [Citation.]" (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 670.) An appellant is charged with the burden of overcoming the presumption of the correctness of the judgment. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.)

Because the judgment is presumed to be correct, where there is no statement of decision—as is the case here[11]—an appellate court "must infer the trial court . . . made every factual finding necessary to support its decision." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 61 (*Fladeboe*).) And if there is no statement of decision, a reviewing court looks only to the judgment to determine error. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 648.)

Claim preclusion (or res judicata) presents itself in two aspects of this appeal. First, Pham contends that respondents' second action was barred because it involved the same cause of action litigated to conclusion in the first action. Second, Pham alleges in his cross-complaint that the contract was rescinded, thus preventing respondents from pursuing the second action. According to respondents, this rescission cause of action was subject to claim preclusion because Pham was required to assert the claim in the first action. The question of "[w]hether the doctrine of res judicata [claim preclusion] applies in a particular case is a question of law which we review de novo. [Citation.]" (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.) We therefore consider both questions as noted above de novo. (*Ibid*.)

The trial court's findings on a claim for rescission are reviewed for substantial evidence. (*Hil-Mac Corp. v. Mendo Wood Products, Inc.* (1965) 235 Cal.App.2d 526, 530 (*Hil-Mac Corp.*).)[12] " 'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, original italics (*Foreman & Clark*).) "In a substantial evidence

---

[11] The trial court noted in the judgment in the second action that the parties did not request a statement of decision.

[12] Pham argues that our review of the trial court's denial of Pham's claim for rescission is de novo. We reject this contention.

challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) The appellant "bear[s] the burden of demonstrating that there is no substantial evidence to support a challenged factual finding. [Citation.]" (*Picerne Construction Corp. v. Castellino Villas* (2016) 244 Cal.App.4th 1201, 1208 (*Picerne Construction*).)

B. Claim Preclusion (Res Judicata)

We address first the contention by Pham that respondents' second action was not maintainable under the doctrine of claim preclusion (res judicata). Pham contends that the second action concerned the same position respondents took in the first action, i.e., that Pham had "breached the same contract in the same way" by refusing to convey title to Kristopher.

1. Applicable Law

We identify legal principles concerning the doctrine of claim preclusion, often referred to as res judicata, as enunciated by our high court in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN Holdings*).[13] "Claim preclusion . . . acts to bar claims that

[13] The Supreme Court of California has noted that there has been some confusion in courts' use of terminology. (See *DKN Holdings*, *supra*, 61 Cal.4th at pp. 823-824.) The term " 'res judicata' [has frequently been used] as an umbrella term encompassing both claim preclusion and issue preclusion, which [the Supreme Court has] described as two separate 'aspects' of an overarching doctrine. [Citations.] Claim preclusion, the ' " 'primary aspect' " ' of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. [Citations.] Issue preclusion, the ' " 'secondary aspect' " ' historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit. [Citation.]" (*Ibid.*) Because courts have alternatively referred to issue preclusion as "collateral estoppel" and "res judicata," the Supreme Court, in its discussion in *DKN Holdings*, elected to use the

were, or should have been, advanced in a previous suit involving the same parties. [Citation.]" (*Id.* at p. 824.) Claim preclusion applies to " 'prevent[] [the] relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.]" (*Ibid.*) The establishment of claim preclusion operates under principles of merger and bar to prevent the relitigation of matters: "[I]f a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*).) The doctrine "is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811.)

As we discuss below, the significant question here is the first element of claim preclusion, whether the second action "involves . . . the same cause of action" as the first action. (See *DKN Holdings, supra*, 61 Cal.4th at p. 824.) "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.' [Citation.] Under this theory, '[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term . . . . " ' [Citation.]" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798 (*Boeken*).)

---

terms "claim preclusion" and "issue preclusion." (*Id.* at p. 824.) Only claim preclusion is involved in this appeal.

Although the phrase "cause of action" has different meanings in California, in the context of determining whether claim preclusion applies, it means "the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.] . . . 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he [or she] presents a different *legal ground* for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. [Citation.]" (*Boeken*, *supra*, 48 Cal.4th at p. 798.)

2. Claim Preclusion Doctrine Does Not Apply to Second Action

As noted above, the doctrine of claim preclusion applies "if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.]" (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) Plainly, the second and third requirements are satisfied here. The parties in the two actions were identical. Although respondents, after commencing the second action, filed an appeal on December 17, 2015, from the judgment entered in the first action, they filed a notice of abandonment of that appeal on January 18, 2017, months before the judgment in the second action. The judgment in the first action was therefore final for purposes of determining whether respondents' second action was barred. (*White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 762.) We thus address whether the second action involved the same cause of action as the first action.

Pham contends that both the first and second actions involved the same cause of action in that they involved the same primary right. He asserts that both actions arose from a breach of contract alleged by respondents. Quoting from *Mycogen*, *supra*, 28 Cal.4th at page 905, Pham contends that in this case, as in *Mycogen*, the judgment in the first action

" 'bars a subsequent action for additional relief on the same breach.' " He asserts that respondents in both actions "litigated their alleged injury from Pham's refusal to convey the [p]roperty under a contract for the sale of the [p]roperty."

Respondents disagree. They argue that the issue in the second action differed from the issue in the first action. Specifically, the second action concerned whether Pham was contractually obligated to convey his one-half interest in the property to Kristopher because respondents, after the trial in the first action, had fulfilled all of their obligations under the contract. Respondents argue that "[n]ot only was the issue of Pham's refusal to sign a quitclaim [deed] after payoff of the mortgage **not** 'actually and necessarily litigated' in the first action [citations], but [the trial court] stated explicitly, in an order denying respondents a new trial in the first action, that the court did not have jurisdiction to adjudicate Pham's refusal to sign the quitclaim [deed] after respondents' posttrial payoff of the mortgage." (Original emphasis.) Respondents contend therefore that because new facts and circumstances occurred after the first action that were a new violation of their primary rights, the doctrine of claim preclusion does not apply to the second action.

We acknowledge that the two actions share many common features. Both cases involve the same contract and the same property. In both complaints, respondents alleged a claim for declaratory relief to adjudicate the parties' rights under the contract, and specifically an adjudication that Kristopher was contractually entitled to sole ownership of the property. Further, both cases share many common relevant facts, including the fact of any and all payments by respondents from January 2, 2013 (the date the contract was executed) to April 4, 2014 (the date the first action was filed). And it is indisputably true that the same *kind* of alleged breach by Pham—his failure to convey title to the property to Kristopher—was alleged in both actions.

There are, however, significant differences between the two cases. In the first action, respondents alleged Pham had breached the contract by not conveying the property after they had performed all obligations by paying Pham $145,000—the $120,000 specified in the

contract plus an additional extracontractual amount of $25,000 that Pham coerced them to pay. In contrast, in the second action, respondents alleged that (1) as of August 21, 2015, they had fulfilled all obligations under the contract by paying the purchase price of $385,000, by paying Pham $160,000 and by paying off the deed of trust encumbering the property (in the amount of approximately $225,000); and (2) Pham thereafter breached the contract by failing and refusing to execute and deliver a quitclaim deed conveying all of Pham's right, title, and interest in the property to Kristopher. These additional facts underlying the breach of contract by Pham alleged by respondents in the second action occurred *after* trial of the first action, and therefore perforce were not and could have been part of the first action.

Indeed, the trial court in the first action acknowledged that questions of any posttrial performance of obligations under the contract were not before it, and therefore could not be adjudicated by the court. In the order denying respondents JNOV and new trial motions, the court stated: "[I]mmediately after the court stated its decision, [respondents] requested that the court maintain jurisdiction over the matter so that [respondents] could pay off the mortgage and thereafter the court could compel [Pham] to sign the deed and transfer the property. The court expressed that it did not have jurisdiction to do so and denied [respondents'] request." The court, as recited in its postjudgment order, established a mechanism—by delaying entry of judgment and setting a date for the parties to return to court—for the parties to attempt to enter into a stipulation "whereby they could agree with and comply with the court's trial decision, exchange money and the deed and the court would so note in its judgment." The court explained in its postjudgment order that upon the parties' return to court for a new hearing, "[i]f there was an agreement the court would so note in its judgment, and if no stipulation was reached, then the court would enter judgment according to its decision. There was no agreement between the parties[;] therefore, the court entered its judgment as indicated." The court concluded further in its order that Code of

Civil Procedure section 657[14] permitted the court to vacate or modify its decision based upon newly discovered evidence that is material to the moving party. It denied respondents' JNOV and new trial motions, concluding that "[respondents'] payment of the mortgage pursuant to the contract after the court's ruling and [Pham's] subsequent behavior [are] not newly discovered evidence" under section 657.

Under *Mycogen, supra,* 28 Cal.4th at page 896, a party cannot bring successive actions in violation of the claim preclusion doctrine where it "brought a second action seeking the legal remedy of damages based upon the *same* breach of contract." (Italics added.) Here, contrary to Pham's contention, respondents in the second action did not assert a remedy—a judicial declaration that Kristopher was the sole owner of the property and that Pham had no right, title or interest in the property—based upon the *same* breach of contract as alleged in the first action. Rather, the breach alleged in the second action was the failure to convey the property *after* the trial of the first action had concluded and *after* respondents had, posttrial, paid off the mortgage. (See *Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1380 ["if 'the second suit is on a different cause of action, as where there are successive breaches of an obligation, or separate and distinct torts, *or new rights accrued since the rendition of the former judgment*,' " doctrine of claim preclusion does not apply].)

A key policy of the claim preclusion doctrine is that a plaintiff will be barred from engaging in piecemeal litigation by forgoing the presentation of a legal theory to vindicate a primary rights violation in an initial lawsuit, only to present that additional theory in a second lawsuit after the first suit is finally determined. As the California Supreme Court explained 80 years ago: " 'If the matter [in the current action] was within the scope of the [prior] action, related to the subject-matter and relevant to the issues [in the prior action], so

---

[14] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 (*Sutphin*).) Here, the policy would not be subserved by applying the claim preclusion doctrine. Since the facts giving rise to the alleged breach in the second action—respondents' payoff of the mortgage and the payment of $160,000 required under the contract, and Pham's refusal thereafter to execute and deliver a quitclaim deed—occurred after the trial of the first action, and the trial court in the first action expressly held it could not consider those new facts, they were not "on matters which . . . could have been raised, on matters litigated or litigable." (*Ibid.*)

Pham asserts that *Mycogen, supra,* 28 Cal.4th 888 "is directly on point" to support his position that the second action is subject to claim preclusion because it involved the same cause of action as the first action. There, the plaintiff (MPS) brought an initial lawsuit for declaratory relief and specific performance with respect to a technology licensing agreement with the defendant (Monsanto). (*Id.* at p. 894.) MPS did not seek damages. (*Ibid.*) Monsanto prevailed at trial on cross-motions for summary judgment, but the matter was reversed on appeal with directions to enter judgment in favor of MPS. (*Ibid.*) Some years later, MPS brought a second action against Monsanto for damages for breach of contract with respect to the same licensing agreement. (*Id.* at pp. 894-895.) MPS prevailed at trial and a jury awarded substantial damages. (*Id.* at p. 895.) The court of appeal reversed, concluding that under the doctrine of claim preclusion, the plaintiff could not maintain the second lawsuit. (*Id.* at p. 896.)

The California Supreme Court affirmed, concluding that the claim preclusion doctrine applied. (*Mycogen, supra,* 28 Cal.4th at p. 896.) It found that in both lawsuits, MPS "alleged a breach of the same contract, differing only in the requested remedy." (*Id.* at

p. 905.) The high court reasoned that, in the two lawsuits, "there were no separate and distinct covenants breached at different times. Instead, there was a single breach of contract when Monsanto refused to negotiate licenses and repudiated the agreement. All remedies requested by virtue of this breach must be requested in a single action or be forfeited. MPS could have sought alternative remedies, such as requesting either total damages or specific performance plus delay damages, but they must have been pled in the same suit. [Citations.]" (*Id.* at p. 908.) The Court therefore held that the two lawsuits "were based on the violation of the same primary right" and the second lawsuit was therefore subject to claim preclusion. (*Id.* at p. 909.)

Mycogen is distinguishable. As the Supreme Court emphasized, the two lawsuits arose out of a single breach of the subject licensing agreement. (*Mycogen, supra*, 28 Cal.4th at p. 908.) The second suit was thus precluded under the principle "that a judgment in an action for breach of contract bars a subsequent action for additional relief *on the same breach*. [Citation.]" (*Id.* at p. 905, italics added.) In contrast, here, the first action was brought based upon Pham's alleged breach of contract occurring prior to April 4, 2014 (when the first action was commenced), while the second action was based upon Pham's alleged breach occurring on August 21, 2015, after the trial in the first action. The principle in *Mycogen* of the two suits being "based on the violation of the same primary right" (*id.* at p. 909) was not involved in this case.

Pham also relies on *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319 (*Alpha Mechanical*). There, a subcontractor (Alpha) sued a contractor (RAS) and its surety for, inter alia, breach of the subcontract and to enforce payment bonds. (*Id.* at pp. 1323-1324.) The contractor filed a cross-complaint alleging that the subcontractor had breached the contract by negligently performing and failing to perform tasks under the agreement and by failing to correct defective work. (*Id.* at p. 1324.) RAS settled its cross-complaint before trial of the action. (*Ibid.*) Thereafter, at the trial of the Alpha's complaint, the court granted the

plaintiff's motion in limine precluding RAS from asserting various affirmative defenses in its answer in which the contractor alleged that Alpha's own negligence was the cause of its damages and Alpha's material breach of contract and failure to fulfill contractual conditions precedent barred its recovery. (*Id.* at pp. 1324-1325.) The trial court held that evidence supporting such affirmative defenses "was inadmissible under principles of res judicata and common law retraxit because it was new matter based on the same facts put in issue by RAS's cross-complaint." (*Id.* at p. 1325.)

The appellate court affirmed. It concluded that the contractor "sought to relitigate the same claims. In its cross-complaint, RAS sought relief under theories of breach of contract and negligence for Alpha's defective or wrongful performance . . . RAS's sixth, eighth, 11th, and 12th affirmative defenses likewise sought to hold Alpha responsible for its wrongful and negligent contract performance resulting in those damages. In both proceedings, RAS's primary right was its right to competent performance by Alpha, Alpha's primary duty was to competently perform under the contract, and Alpha's wrong was its negligent or wrongful performance, assertedly resulting in property damage." (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1332.)

Alpha Mechanical affords Pham no support for his position that the two actions initiated by respondents involved the same primary right. Aside from involving very different circumstances than presented here, *Alpha Mechanical* concerned the *same* claim in the two cases, one asserted by the contractor offensively in a cross-complaint, and the other asserted defensively as affirmative defenses to its answer to the subcontractor's complaint. They were "matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin, supra,* 15 Cal.2d at p. 202.) In contrast, here, the second action involved an entirely different claim against Pham and different nucleus of key facts—

Pham's alleged breach of contract after respondents' posttrial payoff of the mortgage—than were presented in the first action.[15]

The parties have cited no authority presenting factual circumstances similar or analogous to those presented here—a case in which a plaintiff-buyer unsuccessfully litigates a claim that the defendant-seller has breached a contract for the sale of real property because the court concludes that the buyer has not fully performed, the court does not adjudicate that the contract is terminated, and, after decision, the buyer fully performs under the contract as interpreted by the court and brings a second suit against the seller for his subsequent breach. Notwithstanding the absence of factually analogous authority and the unusual nature of the circumstances in this case, we conclude the doctrine of claim preclusion is not a bar. Respondents' second action did not consist of "the same cause of action" alleged by respondents in the first action. (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) The two cases were not "based on the violation of the same primary right." (*Mycogen*, *supra*, 28 Cal.4th at

---

[15] Pham also relies on *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170 in support of his position that the claim preclusion doctrine applies here. *Eichman* in fact supports our conclusion here that the doctrine is inapplicable because the second action does not involve the same primary rights litigated in the first action. The *Eichman* court reiterated claim preclusion principles we have discussed, *ante*: "California law approaches the issue by focusing on the 'primary right' at stake: if two actions involve the *same injury* to the plaintiff and the *same wrong* by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.] 'A cause of action is based upon the nature of a plaintiff's injury. " ' . . . The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.' " ' [Citation.] [Citation.] If the same primary right is involved in two actions, judgment in the first bars consideration not only of all matters actually raised in the first suit but also all matters which could have been raised [citation]." (*Id.* at pp. 1174-1175, italics added.) In contrast, here, as we conclude, the same primary right was not involved in the two actions, and this is not an instance in which respondents in the second action pleaded different theories of recovery or different forms of relief based upon the same wrong they asserted in the first action.

p. 909.) The first concerned Pham's alleged breach of contract occurring prior to April 4, 2014; the second action involved Pham's alleged breach of contract on August 21, 2015, after the trial of the first action and after respondents' posttrial further performance under the contract. The alleged violation of respondents' primary rights in the second action was simply not a "matter[] which . . . could have been raised, on [a] matter[] . . . litigable" in the first action. (*Sutphin*, *supra*, 15 Cal.2d at p. 202.)

C. Pham's Rescission Claim

Pham alleged in the first cause of action of his cross-complaint that there was a material failure of consideration as a result of respondents' failure to pay off the mortgage or pay $160,000 additionally owed under the contract, and that, therefore, it should be judicially declared that the contract was rescinded. The court denied that claim, as well as the two other claims alleged in the cross-complaint.

Pham challenges on appeal the trial court's rejection of his rescission claim.[16] He contends that his conduct of "refus[ing] to convey the house in December 2013 through April 2014 was notice of his intention to rescind the [c]contract." He argues further that he was excused from being required to offer to restore the consideration he received from respondents, or, alternatively, that he "repeatedly offered to restore consideration to [respondents]" both in his cross-complaint and at trial.

Respondents argue that Pham's rescission claim in the second action was subject to claim preclusion. They assert further that despite the trial court's affording him "every opportunity to put on a viable claim for rescission," Pham failed to present such a case. Respondents also argue that Pham failed to prove that he had tendered or could tender the consideration paid by respondents as required for rescission. Lastly, respondents dispute Pham's claim "that there was a failure of consideration because respondents took too long to

[16] Pham does not challenge the court's ruling on the remaining two causes of action of his cross-complaint, breach of contract and fraud and deceit (false promise). Accordingly, we will not address the ruling as to those claims.

complete the purchase of the property." They assert that Pham's argument was refuted at trial.

We address initially the argument that Pham's rescission claim is subject to claim preclusion. Respondents, citing *DKN Holdings*, *supra*, 61 Cal.4th 813, contend that Pham could have raised his claim for rescission in the first action, but "he failed to raise it until after final judgment on the merits in the first lawsuit." The cross-complaint, respondents argue, was therefore "barred by claim preclusion."[17] Respondents, apart from identifying the three requirements of claim preclusion in quoting *DKN Holdings*, present no authority to support their argument that the doctrine applies here. They have thus abandoned the argument. (See *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284 [failure to cite legal authority for position in appellate brief "amounts to an abandonment of the issue"].) Moreover, it is difficult to understand how claim preclusion could apply in this instance. Here, as noted in respondents' brief, Pham admitted in his testimony in the second trial that he had not filed a cross-complaint seeking rescission in the first lawsuit. Since "[*c*]*laim preclusion* 'prevents relitigation of the same cause of action in the second suit between the same parties' " (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824, original italics), and Pham did not assert *any* claims in the first action,

---

[17] Although respondents in their brief quote from *DKN Holdings* regarding the three requirements of claim preclusion (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824), they also assert in the same paragraph of their argument, without elaboration, that Pham's cross-complaint was barred by "issue preclusion." We conclude that respondents' use of the term "issue preclusion" in its brief is a misnomer, because (1) respondents cite only to the legal requirements of claim preclusion, notwithstanding the fact that the paragraph in *DKN Holdings* immediately following the one from which they quote addressed issue preclusion; (2) they provide no substantive argument that Pham's rescission claim is barred by issue preclusion; and (3) the conclusion section of their brief contains the assertion that Pham's rescission claim was "barred by claim preclusion." Moreover, since "[*i*]*ssue preclusion* prohibits the relitigation of issues argued and decided in the previous case" (*ibid.*, original italics), and there is no indication in the record that the parties argued the issue of rescission in the first action, it appears that there could be no meritorious argument that Pham's cross-complaint for rescission was subject to issue preclusion.

the claim preclusion doctrine is inapplicable to Pham's cross-complaint in the second action.[18]

Although Pham's rescission claim is not subject to claim preclusion, his claim that the trial court erred in rejecting that claim is procedurally barred for another reason: Pham has failed to support his appellate claim with adequate citation to the record below. His opening brief contains five citations to the clerk's transcript and only one citation to the reporter's transcript. Pham has not cited to the record regarding any *evidence* from the trial of the second action that he contends supported his claim for rescission. The sole reference to the reporter's transcript in his opening brief is to the argument of his counsel in support of Pham's postjudgment motions to vacate judgment or, alternatively, for JNOV. Pham's failure to include citations to the record in his appellate brief constitutes a violation of rule 8.204(a)(1)(C) of the California Rules of Court,[19] which requires that every brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." "When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.)

Even were we to address Pham's contention, forfeited on appeal, we would nonetheless conclude that the trial court did not err in rejecting his rescission claim.

Pham relies on Civil Code section 1689, subdivision (b)(2) in support of rescission, which provides that a party may rescind a contract "[i]f the consideration for the obligation

---

[18] Respondents do not argue here that Pham's cross-complaint for rescission was procedurally barred because it was a compulsory cross-complaint that Pham was required to plead in the first action under section 426.30, subdivision (a). Likewise, they did not make this argument below or assert the matter as an affirmative defense. (See *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1158.) We therefore do not address that question here.

[19] All further unspecified rule references are to the California Rules of Court.

of the rescinding party fails, in whole or in part, through the fault of the party as to whom he [or she] rescinds." Thus, under this statute, a party may unilaterally rescind the contract where there is a "[f]ailure of the consideration for the obligation of the rescinding party, in a material respect." (*Nelson v. Sperling* (1969) 270 Cal.App.2d 194, 195.) A party effects a rescission "by giving 'notice of rescission to the party as to whom he [or she] rescinds; . . .' (Civ.Code, § 1691.) ' " 'It is not necessary that the notice to rescind shall be formal and explicit; it is sufficient that notice shall be given to the other party which clearly shows the intention of the person rescinding to consider the contract at an end.' " ' [Citations.]" (*Wilson v. Lewis* (1980) 106 Cal.App.3d 802, 809-810.) The notice provided by the rescinding party must be prompt, and it must be accompanied by "an offer to restore any consideration received. [Citation.]" (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 234.) The plaintiff has the burden of proving all elements to support his or her claim for rescission of contract. (*Elko Mfg. Co. v. Brinkmeyer* (1932) 216 Cal. 658, 665; see also *Ware v. Security-First Nat. Bank of Los Angeles* (1936) 7 Cal.2d 604, 608 (*Ware*) [rescinding party has burden of proving alleged failure of consideration].)

The appellate court reviews a trial court's findings concerning a rescission claim under a substantial evidence standard. (*Hil-Mac Corp., supra*, 235 Cal.App.2d at p. 530.) Here, various components of Pham's required showing for rescinding the contract involved determinations of fact by the trial court. (See *Nicolai v. Nicolai* (1950) 96 Cal.App.2d 951, 958 [whether parties' conduct resulted in rescission "was a question of fact for the determination of the trial court"].) For example, whether the alleged failure of consideration as claimed by Pham was a material failure under Civil Code section 1689 "poses a question of fact" for resolution by the trial court. (*Calabrese v. Rexall Drug & Chemical Co.* (1963) 218 Cal.App.2d 774, 782 (*Calabrese*).) Whether Pham gave notice of rescission, and, if so, whether such notice was promptly given, are determinations of fact. (*French v. Freeman* (1923) 191 Cal. 579, 589 [whether notice of rescission was given promptly "will depend upon all the circumstances of the particular case"].) And whether Pham offered to restore to

respondents the consideration he received is also a question of fact. (See *Beardsley v. Clem* (1902) 137 Cal. 328, 332.)

An appellant asserting a substantial evidence challenge to a judgment has the obligation to present a fair description of the underlying evidence. (*Foreman & Clark, supra*, 3 Cal.3d at p. 881 [appellants must " 'set forth in their brief *all* the material evidence on the point and *not merely their own evidence*' "].) " 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient.* [Citation.]' [Citation.] Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived.' [Citation.]" (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, original italics (*Schmidlin*).)

In his appellate briefs, Pham's challenge to the court's denial of his rescission claim contains the implicit argument that there was no substantial evidence to support such denial. In making this implied argument, however, Pham failed to meet his obligations as an appellant to " 'set forth in [his] brief *all* the material evidence on the point and *not merely* [*his*] *own evidence*.' " (*Foreman & Clark, supra,* 3 Cal.3d at p. 881.) For instance, Pham cited no evidence from the reporter's transcript on the question of whether there was a material failure of consideration, a factual matter for resolution by the trial court. (*Calabrese, supra,* 218 Cal.App.2d at p. 782.) Instead, he made the conclusory argument that because respondents did not pay the mortgage by December 31, 2013 (when the contract specified that the two $60,000 installment payments were due), they did not pay within a reasonable time. Pham's failure in his appellate briefs to present the evidence, both favorable and unfavorable, on the issue of whether, under Civil Code section 1689, subdivision (b)(2), there was a material failure of consideration justifying rescission—as well as Pham's similar failure to present evidence with citations to the record concerning other factual findings concerning rescission, such as whether he gave timely notice of

rescission, and whether he offered to restore the consideration provided by respondents under the contract—constituted Pham's waiver of the appellate arguments. (*Schmidlin*, *supra*, 157 Cal.App.4th at p. 738.) In any event, we conclude, notwithstanding Pham's inadequate showing in his appellate briefs, that there was substantial evidence supporting the trial court's implied factual findings upon which it concluded that Pham did not sustain his burden of proving the elements of his rescission claim. (See *Fladeboe*, *supra*, 150 Cal.App.4th at p. 61 [where there is no statement of decision, appellate court infers that "trial court . . . made every factual finding necessary to support its decision"].)

During oral argument, Pham's counsel clarified to this court that he was *not* asserting on appeal a challenge to the existence of substantial evidence to support the trial court's express or implied evidentiary findings concerning the rescission claim. Rather, counsel explained that his position was that, as a matter of law, the trial court erred by rejecting Pham's rescission claim under the established facts of the case. As argued, Pham's position is that although he did not provide respondents with either written or oral notice that he was rescinding the contract, his refusal to convey the property after respondents made a demand for conveyance and sued Pham in the first action constituted a notice of rescission by conduct.

Pham has cited no apposite authority to support his legal position that, under the circumstances presented here, his refusal to convey the property to respondents constituted an effective and timely notice of rescission of the contract. His claim consists of the unsupported contentions that (1) a party's conduct may constitute notice of rescission, and (2) Pham's refusal to convey the property to respondents here was, as a matter of law, effective notice of rescission. We reject Pham's argument. We are aware of no authority—and Pham has cited none—that would *compel* the conclusion that Pham's refusal to convey the property constituted notice of rescission. As noted, we infer that the trial court here made appropriate factual findings, including a finding that there was no rescission notice, in support of its conclusion that Pham had not established his claim for rescission. (See

Fladeboe, *supra*, 150 Cal.App.4th at p. 61.) The trial court did not err in impliedly finding there had been no notice of rescission by Pham.

D. Pham's Contract Termination Argument

Pham argues on appeal that respondents' failure to comply with the obligations in the contract, including paying off the loan "for nearly two years was a material breach of contract." He contends that his refusal of respondents' demands to convey title constituted an exercise of his right to terminate the contract. Pham asserts that the trial court erred in concluding that Kristopher was the sole owner of the property, "because the [c]ontract that could convey the [p]roperty had already been terminated before performance could be considered complete."

Pham did not assert as a defense to the complaint in the second action—notwithstanding that he alleged 29 separate affirmative defenses in his answer—that the contract could not be enforced by respondents due to its prior termination. Similarly, Pham did not allege contract termination as a theory, such as through declaratory relief, in his cross-complaint. He did not contend in his trial brief that the contract had been terminated. And Pham, at trial, did not present argument or evidence that respondents were not entitled to recovery because Pham had terminated the contract due to respondents' material breach thereof.

" 'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' [Citation.]" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1, original italics.) A party's failure to preserve a claim at the trial level forfeits it on appeal. (*In re S.B.* (2004)

32 Cal.4th 1287, 1293, fn. 2, superseded on other grounds by statute as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) This principle is applicable here. Pham's failure to raise the defense in the second action that the contract had been terminated as a result of respondents' prior material breach results in a forfeiture of the argument on appeal. (*Ibid.*)

Even were we to overlook Pham's failure to preserve the argument, it nonetheless fails. "[T]he question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. [Citations.]" (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277.) Further, the issue of whether the contract was terminated by the nonbreaching party is also one of fact. (See *House v. Lala* (1960) 180 Cal.App.2d 412, 419 [affidavits raising factual issue of whether contract was terminated precluded summary judgment].)

In his appellate briefs, Pham appears to argue that the evidence at trial showed that he terminated the contract based upon respondents' nonperformance, and that the court disregarded this evidence. First, since Pham did not claim below that the contract had been terminated as a basis for denying relief to respondents, the trial court was not required to address the question. Second, Pham's appellate argument that the contract was terminated due to respondents' material breach—as was the case with his argument regarding the rescission claim—is devoid of evidentiary support. Neither his opening brief nor his reply brief contains any citations to the reporter's transcript of the trial referring to evidence relevant to his contract termination argument. This omission is in violation of rule 8.204(a)(1)(C); the argument is forfeited on this basis as well. (*In re S.C.*, *supra*, 138 Cal.App.4th at pp. 406-407.) Third, to the extent that this court views Pham's appellate briefs as challenging the sufficiency of the evidence supporting any implied findings concerning a claimed termination of the contract, Pham did not meet his burden in challenging the sufficiency of the evidence supporting the trial court's decision. (See *Picerne Construction*, *supra*, 244 Cal.App.4th at p. 1208.) Pham did not present a fair description of the underlying evidence as required. (*Foreman & Clark*, *supra*, 3 Cal.3d at

p. 881.) He therefore waived the appellate argument. (*Schmidlin*, *supra*, 157 Cal.App.4th at p. 738.) Moreover, because we presume the judgment to be correct, and because in this case, there was no statement of decision, we "must infer the trial court . . . made every factual finding necessary to support its decision." (*Fladeboe*, *supra*, 150 Cal.App.4th at p. 61.) Implicit in the court's judgment that Kristopher was the sole owner of the property and that Pham held no interest in it were, inter alia, findings that (1) respondents had not materially breached the contract, (2) Pham had not terminated the contract, and (3) the contract was viable and subject to enforcement by respondents.

As was the case with his rescission argument, Pham's counsel at oral argument clarified that he was not challenging the factual findings made by the trial court related to Pham's termination of contract claim. Rather, Pham's counsel asserted that Pham's refusal to convey the property constituted as a matter of law a notice of termination of the contract, and the trial court erred by not applying this theory to bar respondents' claim. Similar to his argument on appeal concerning rescission, Pham cites no apposite authority that under the circumstances of this case, Pham's refusal to convey the property to respondents was, as a matter of law, notice of termination of the contract.[20] We therefore reject Pham's unpreserved and unsupported contract termination argument.[21]

---

[20] In support of his contention that his refusal to convey the property constituted notice of termination based upon respondents' material breach, Pham cites *Whitney Inv. Co. v. Westview Development Co.* (1969) 273 Cal.App.2d 594, 603. *Whitney* does not support Pham's position. The court there did not conclude that a seller's refusal to convey property due to buyer's material breach, as claimed here by Pham, constituted a notice of contract termination. Rather, the appellate court recited the general principle—supportive of the conclusion here that respondents' claim was not barred under Pham's belatedly raised contract termination theory—that "[w]hile a notice of termination or cancellation of a contract for breach need not be formal and explicit, it should clearly indicate to the defaulting party that the injured party considers the contract terminated. [Citation.]" (*Ibid.*)

[21] Pham appealed from both the judgment and the order denying the motions for JNOV and to vacate the judgment. His briefs do not address the challenge to the postjudgment order, other than stating in the conclusion of his opening brief that this court should "vacate" the order denying the motions for JNOV and to vacate the judgment. Pham

III. DISPOSITION

The judgment of June 7, 2017, and the order of July 14, 2017, denying the motion to set aside and vacate judgment, or, in the alternative, the motion for judgment notwithstanding the verdict, are affirmed.

---

has abandoned any challenge to the propriety of the postjudgment order. (*Nisei Farmers League v. Labor & Workforce Development Agency* (2019) 30 Cal.App.5th 997, 1018 [arguments in appellate briefs raised in perfunctory fashion will be deemed abandoned].) In any event, since Pham's argument below in support of his alternative motions for JNOV or to vacate judgment was that the second action was subject to claim preclusion—an argument we have concluded lacks merit—the court did not err in denying Pham's postjudgment motions.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, Acting P.J.

GROVER, J.

Le v. Pham
H044978